TAY CHUEN SIANG

v.

WANG, CHIAO-WEN

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[DIVORCE PETITION NO. (MT-1) 33-480-2006]
23 APRIL 2009

FAMILY LAW: *Children - Custody - Welfare of children - Primary factors considered - Whether changing custody care and control of children would disrupt and disturb children's life - Whether status quo should be maintained - Law Reform (Marriage and Divorce) Act 1976, s. 88(3) - Whether applicable to facts of case*

FAMILY LAW: *Financial obligations - Maintenance payments - Assessment of - Circumstances of the parties - Law Reform (Marriage and Divorce) Act 1976, s. 78*

The petitioner (Tay) and the respondent (Wang) were married and have two children, a son born on 3 March 2004 and a daughter born on 10 July 2005. On 26 June 2006, Tay petitioned the court for a dissolution of the marriage. In his amended petition, Tay asked for custody, care and control of the children. In this connection, it was necessary to set out the ancillary reliefs prayed for which were (i) maintenance for both children to be borne by Tay; (ii) Wang be restrained and prohibited from removing the children from Tay's custody and from taking the children out of Malaysia; (iii) Wang be restrained from harming the children, physically or psychologically or emotionally in any manner whatsoever and (iv) Tay to pay Wang maintenance of Singapore Dollars $500 per month. Learned counsel for Tay submitted that the primary consideration was the welfare of the children. According to Tay, he suffered fear and anxiety due to Wang's irrational behaviour and threats of death and violence against the children. It was further submitted that the children have remained safe with Tay and his family and that changing the custody care and control of the children at this stage would disrupt and disturb the children's life. In reply, learned counsel for Wang invoked s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') which operated in favour of Wang the natural mother of the children. Wang also denied the allegations made by Tay of her alleged unstable and unreasonable conduct. Further, on the issue of maintenance, Wang had asked for a lump sum payment of RM250,000 or a monthly sum of RM3,000 including 50% share of Tay's EPF/CPF contributions for the period from 18 March 1998 to the date of divorce.

Held:

(1) The children are both of tender age. The presumption under s. 88(3) of the Act is that it is good for the children to be with her mother. In deciding whether the presumption applied to the facts of this case, s. 88(3) provides that the court shall have regard to the undesirability of disturbing the children's life by changes of custody. The court, however is not precluded from considering any other factors which may be relevant or have an effect on the children's welfare. It is trite that the welfare of the children is paramount. (para 6)

(2) According to the medical report dated 13 November 2006 by one Dr Nelson Lee, Wang had been brought to the Institute of Mental Health on 14 August 2006 for assessment after being arrested by the police for an alleged suicide attempt *ie,* threatening to jump while carrying her youngest child at that time. This incident was corroborated by Baluyot Sara Ganza the domestic maid who was present in the house at the material time. (para 7)

(3) The children were present in court on 28 August 2008 and were interviewed in chambers. They appeared to be in good physical and mental health and were well taken care of. There was nothing to indicate otherwise. Given the situation in which the children have been in Tay's custody since 2006 the court was in favour of maintaining the *status quo*. Changing the custody care and control of the children at this stage would disrupt and disturb the children's life. Further, Wang's behavioural antecedents as disclosed by the affidavit evidence was a cause for concern. The children should not be placed with Wang on the basis of the statutory presumption alone. The fact that the children need a stable environment and the need for continuity of good and proper care were the primary factors the court had taken into account. In addition, as Malaysian citizens, the children should remain in the care and custody of Tay in Malaysia. Hence, the custody, care and control of the children should remain with Tay with reasonable access to Wang. (para 9)

(4) The issue of maintenance was only related to Wang. The assessment of maintenance was based primarily on the means and needs of the parties having regard to the degree of each party's responsibility for the breakdown of the marriage (s. 78 of the Act). This court had taken note of Wang's consent to the dissolution of the marriage. Thus, without apportioning the responsibility for the breakdown of their marriage, the court assessed the maintenance primarily on the means and needs of the parties. Tay drew a net monthly salary of $1,321 after deduction of S$580 for CPF. Wang's needs included food, lodging, transport, personal expenses and life insurance premiums. Wang was, however, a qualified nurse and was employable. When in Malaysia, Wang stayed at a house rented by her father. After taking all the circumstances into consideration the court assessed a sum of RM1,500 per month would be reasonable as maintenance for Wang. (para 10)

[Order accordingly.]

Case(s) referred to:

Amar Kaur Ram Singh v. Najar Singh Sagar Singh [1991] 1 CLJ 294; [1991] 2 CLJ (Rep) 261 HC ***(refd)***

Chan Kam Tai v. Kong Pen Keong [2008] 1 LNS 106 ***(refd)***

Chan Ah Moi v. Phang Wai Ann [1995] 3 CLJ 846 HC ***(refd)***

J v. C [1970] AC 6618 ***(refd)***

Jennifer Patricia Thomas v. Calvin Martin Victor David [2005] 7 CLJ 133 HC ***(refd)***

Loura Dorris Laurence lwn. Thuraisingam James [1995] 4 CLJ 37 HC ***(refd)***

Lee Soh Choo v. Tan Ket Huat [1986] 2 CLJ 143; [1986] CLJ (Rep) 440 HC ***(refd)***

Re T (A Minor) [1993] 2 CLJ 652 HC ***(refd)***

Tan Chong Pay v. Tan Swee Boon [1997] 4 CLJ 625 HC ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 78, 88(3)

For the petitioner - Cik Rajeswari; M/s Nora SW Lam & Assoc
For the respondent - En Gan; M/s Gan & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The petitioner Mr. Tay Chuen Siang (Tay) and the respondent Madam Wang, Chiao-Wen (Wang) were married on 18 March 1998. They have two children a son Tay Jou On born on 3 March 2004 and daughter Tay Sei Yi born on 10 July 2005. On 26 June 2006 Tay petitioned the court for a dissolution of the marriage. In his amended petition Tay also asked for custody, care and control of the children. In this connection, it is necessary to set out the ancillary reliefs prayed for which are as follows:

(i) Maintenance for both children to be borne by Tay;

(ii) Wang be restrained and prohibited from removing the children from Tay's custody and from taking the children out of Malaysia;

(iii) Wang be restrained from harming the children, physically, psychologically or emotionally in any manner whatsoever; and

(iv) Tay pay to Wang maintenance of Singapore Dollars $500 per month.

[2] At the hearing of the petition, learned counsel for Wang informed the court that Wang was not objecting to the dissolution of the marriage. However, Wang took issue on two matters. Firstly, Wang wanted custody, care and control of the children with reasonable access to Tay. Wang wanted RM2,000 per month as maintenance for the children. Secondly, Wang wanted for herself a lump sum maintenance of RM250,000 or in the alternative RM3,000 per month. Wang also wanted Tay to pay to her 50% share of Tay's EPF/CPF contributions for the period from 18 March 1998 to the date of order. The following affidavits filed by the parties were considered by the court:

(1) Tay's affidavit affirmed on 16 June 2006.

(2) Wang's affidavit in reply affirmed on 1 August 2008.

(3) Tay's affidavit in reply affirmed on 6 October 2008.

(4) Wang's affidavit in reply affirmed on 17 October 2008.

(5) Tay's affidavit in reply affirmed on 23 October 2008.

(6) Wang's further affidavit affirmed on 20 January 2009.

(7) Tay's further affidavit affirmed on 3 February 2009.

Undisputed Facts

[3] The marriage was registered on 18 March 1998 at Johore Bahru. There are two children of the marriage. Tay is a Malaysian and works in Singapore. Wang is a Taiwanese national. The family leased/rented an apartment in Singapore as well as resided in Johore Bahru family home with Tay commuting between Johore Bahru and Singapore for work. Wang is a trained nurse but was a home maker during the marriage. The petition was filed on 16 June 2006. Initially, Tay prayed for custody care and control of their daughter whilst allowing Wang custody care and control of their son, with reasonable access granted to each other. On 14 September 2006 Tay filed an application seeking an injunction, custody care and control of the children and for a protection order against Wang. On 21 September 2006 the court granted an interim order for (i) an injunction against Wang from removing the children out of Malaysia; (ii) giving custody care and control of the children to Tay; and (iii) a protection order for the children. Subsequently on 28 August 2007 at the inter partes hearing of the application the court made the following orders pending the hearing of the petition (i) prohibiting Tay and Wang from removing the children out of Malaysia; (ii) granting custody care and control of the children to Tay with reasonable access to Wang; and (iii) protection order for the children against Wang.

Custody, Care And Control Of The Children

[4] Learned counsel for Tay submitted that as the children are below seven years of age the presumption in law is in favour of Wang the mother. However, the presumption is a rebuttable presumption. The primary consideration is the welfare of the children. Wang has demonstrated unstable and unreasonable conduct on a number of occasions towards the children and Tay. Firstly, it is contended that Wang had attempted suicide-murder of the daughter, then a baby less than one year of age. Secondly, Wang tried to jump out of a moving vehicle with the intention of harming herself and the son, then about two years old. Thirdly, A Tay suffered fear and anxiety due to Wang's threat of death and violence against the children. Fourthly, Wang's irrational behaviour against Tay's parents, siblings and domestic maids. Fifthly, Wang's act in removing the children to Taiwan without Tay's knowledge or consent. Lastly, Wang's irrational, suspicious and intrusive B behaviour by getting the maid to track Tay's movements on suspicion of Tay having an extra-marital affair. The children have remained safe with Tay and his family since the aforesaid incidents. Changing the custody care and control of the children at this stage would disrupt and disturb the children's life. In the C circumstances the *status quo* of the children should be maintained. In support of this contention learned counsel relied on *Re T (A Minor)* [1993] 2 CLJ 652, *Tan Chong Pay v. Tan Swee Boon* [1997] 4 CLJ 625, *Chan Ah Moi v. Phang Wai Ann* [1995] 3 CLJ 846, *Laura Dorris Laurence lwn. Thuraisingam James* [1995] 4 CLJ 37, D *Lee Soh Choo v. Tan Ket Huat* [1986] 2 CLJ 143; [1986] CLJ (Rep) 440, *Amar Kaur Ram Singh v. Najar Singh Sagar Singh* [1991] 1 CLJ 294; [1991] 2 CLJ (Rep) 261 and *Jennifer Patricia Thomas v. Calvin Martin Victor David* [2005] 7 CLJ 133.

E **[5]** In reply learned counsel for Wang invoked s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 (the Act) which operates in favour of Wang the natural mother of the children. Wang denies the allegations made by Tay of her alleged unstable and unreasonable conduct. It was submitted that the children F being of tender age need their mother's care, love and affection. Wang has asserted that she is a registered nurse and has no known medical condition that prevents her from seeking gainful employment to support herself financially. Learned counsel also submitted that the authorities cited by Tay's counsel can be easily G distinguished on the facts. In *Re T (A Minor) supra*, the mother suffered from severe mental depression and was administered tranquilizers and anti-depressants. There was also evidence that after giving birth to her child she could not cope with the responsibilities of motherhood because of her severe mental H depression. In *Amar Kaur Ram Singh supra* the mother was also suffering from mental illness and had in fact remained in a mental institution. Learned counsel also relied on *Chan Kam Tai v. Kong Pen Keong* [2008] 1 LNS 106 (a judgment of this court) where the court held that in the absence of evidence to the contrary, it I would be wrong to speculate that the children would be adversely affected by the change in custody.

Findings Of The Court

[6] The children are both of tender age. The presumption under s. 88(3) of the Act is that it is good for the children to be with their mother. In deciding whether the presumption applies to the facts of this case s. 88(3) provides that the court shall have regard to the undesirability of disturbing the children's life by changes of custody. The court, however, is not precluded from considering any other factors which may be relevant or have an effect on the children's welfare. It is trite that the welfare of the children is paramount. What do we mean by the term 'welfare of the child'? The word 'welfare' is defined by the *Cambridge Advanced Learner's Dictionary,* 2nd edn as 'physical and mental health and happiness, especially of a person'. Clearly then, the court must have the physical and mental health and happiness of the children as its overriding consideration (see *J v. C* [1970] AC 6618)

[7] In this case it is pertinent to refer to a medical report dated 13 November 2006 by Dr. Nelson Lee (exh. T2B). According to the medical report Wang was brought to the Institute of Mental Health on 14 August 2006 for assessment after being arrested by the police for an alleged suicide attempt. Wang felt unsupported by her husband and threatened to jump. She was carrying her youngest child at that time. She denied any real intent to kill herself or her child, and that this was done in a fit of anger. There had been previous threats of suicide but she said that there had never been any real attempts. This incident is corroborated by Baluyot Sara Ganza the domestic maid who was present in the house at the material time. She affirmed in her affidavit that:

> Saya mengatakan bahawa pada 13.8.2006 lebih kurang 9:10 pagi, sedang saya berdiri berhampiran meja makan bersebelahan ruang tamu apartmen tersebut, saya telah menyaksikan pertengkaran di antara Pempetisyen dan Responden tersebut. Di pertengahan pertengkaran mereka, saya melihat Responden tersebut menyambar anak perempuannya dan mendukung anak tersebut ke arah tingkap di ruang tamu. Responden kemudiannya telah menjerit kepada Pempetisyen dan mengugut untuk melontarkan anak perempuannya keluar tingkap.
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> Pempetisyen yang bergelut untuk membuat panggilan telefon kepada pihak polis telah mengarahkan saya memanggil pegawai keselamatan untuk meminta pertolongan. Apabila saya bergerak untuk memanggil pegawai keselamatan, Responden telah menjerit

> kepada saya "You watch out! You die!.(Jaga kamu! Kamu mati!). Saya amat terkejut dan ketakutan melihat kelakuan Responden. Walau bagaimanapun, saya berjaya memanggil pegawai keselamatan untuk meminta tolong.

[8] To dispel the allegation that she is not mentally fit, Wang exhibited a medical certificate issued by the Taipei city Hospital Songhe Branch dated 2 June 2008. Wang also stated that subsequent to the divorce she may be compelled to return to Taiwan. She indicated her desire to bring the children to Taiwan with her and that she will take good care of them. She asserts that the children are Taiwanese citizens.

[9] The children have remained with Tay and his family since the aforesaid incidents. Since then Wang has been visiting the children from time to time. The children were present in court on 28 August 2008. They were interviewed in chambers. They appeared to be in good physical and mental health and well taken off. There is nothing to indicate otherwise. They are being brought up in a stable and caring environment. The children's comfort, care and attention appear to be well met. The court is mindful that no person, and no combination of them, can with regard to the children of tender years, take the place of the mother. However, given the situation in which the children have been in Tay's custody since 2006 the court is in favour of maintaining the *status quo*. Changing the custody care and control of the children at this stage would disrupt and disturb the children's life. Wang's behavioural antecedents as disclosed by the affidavit evidence is a cause of concern. The children should not be placed with Wang on the basis of the statutory presumption alone. The tender years of the children, the fact that they have been taken care of by Tay and his parents since 2006, the fact that the children are normal and healthy, the need for a stable environment and the need for continuity of good and proper care are the primary factors the court have taken into account. In addition, as Malaysian citizens the children should remain in the care and custody of Tay in Malaysia. After having regard to all the circumstances of this case it is the court's finding that custody, care and control of the children should remain with Tay with reasonable access to Wang.

Maintenance

[10] As the custody, care and control of the children are to remain with Tay, the issue of maintenance only relates to Wang. Tay is agreeable to paying S$500 per month to Wang. Wang, on the other hand is asking for a lump sum payment of RM250,000 or a monthly sum of RM3,000 including 50% share of Tay's EPF/ CPF contributions for the period from 18 March 1998 to the date of divorce. The assessment of maintenance is based primarily on the means and needs of the parties having regard to the degree of each party's responsibility for the breakdown of the marriage (s. 78 the Act). In this case, however, the court has taken note of Wang's consent to the dissolution of the marriage. Thus, without apportioning the responsibility for the breakdown of their marriage, the court assessed the maintenance primarily on the means and needs of the parties. At the court's direction, the parties filed further affidavits of their means and needs *vide* encls. 47 and 48. Tay draws a net monthly salary of S$1,321 after deduction of S$580 for CPF. Wang's needs include food, lodging, transport, personal expenses and life insurance premiums. Wang, is however, a qualified nurse and is employable. When in Malaysia Wang stays at a house rented by her father. After taking all the circumstances into consideration the court assessed a sum of RM1,500 per month will be reasonable as maintenance for Wang.

[11] For the foregoing reasons the court granted an order for the dissolution of the marriage, custody, care and control of the children to Tay as prayed in (b), (c) and (d), and maintenance for Wang at RM1,500 per month.